

Huber Painting Company, Inc./Dynamic Painting Corp., A Joint Venture and Michael Chapple.
Case 29-CA-14363

December 31, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND OVIATT

On August 3, 1990, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Huber Painting Company, Inc./Dynamic Painting Corp., A Joint Venture, Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

²The judge implicitly found that the General Counsel has established a prima facie showing that Chapple's discharge was due to union activity. We agree. In light of the judge's credibility resolutions, we also find that the Respondent has not met its burden of demonstrating that it would have taken the same action in the absence of Chapple's union activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Kevin Kitchen, Esq., for the General Counsel.
Edward C. Montell, Esq. (Montell, Trakas, Marciano & Montell), of Long Island City, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in Brooklyn, New York, on June 19, 1990. The complaint alleges that Respondent, in violation of Section 8(a)(1) and (3) of the Act, discharged employee Michael Chapple. Respondent denies the material allegations of the complaint: in its opening statement Respondent asserted that Chapple was discharged because he failed to do his job.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the brief filed

by the General Counsel on July 23, 1990, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation with its principal office in College Point, New York, is engaged in providing painting and related services. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Structural Steel and Bridge Painters Union, Local 806 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Respondent's employee Michael Chapple was working as a second year apprentice painting the Brooklyn Bridge beginning in July 1988.¹ Chapple was placed on the job through a minority apprentice program. His immediate supervisor was Foreman Joe Maracic.²

In March 1989, some 2 weeks after work commenced following the winter break, Chapple and some other union members went down to the union hall to speak to Union President Martin Kittle about the way Maracic was running the job.³ Chapple and his coworkers complained that Maracic was sending certain employees home but keeping his "countrymen" on the job, and that Maracic permitted the use of a spray machine on the bridge thereby depriving 12 people of their work. Based on a conversation with "Duke" who was a shop steward, Chapple believed that the use of the machine violated union rules. Kittle said the Company was not supposed to send anybody home due to use of the spray machine. Kittle instructed the men to return to the jobsite and stated that he would see to it that they were paid for the day.

Kittle did not come to the bridge, but he sent Ted Nitis, the business representative of the Union. According to Chapple, Nitis arrived at the jobsite 40 minutes after the employees left the union hall. Nitis met with Maracic and the employees. Nitis told Maracic that the employees were all able bodied and that he should find work for all of them. Then Maracic responded that he hated the minority program and that he wanted to fire "Anthony" and Chapple. Nitis told Maracic that he could not fire Anthony because he had family in the Company and that he could not fire Chapple because he was in the minority program. The next day, all the employees who had gone to the Union with Chapple were sent to another job. Only Chapple was left on the Brooklyn Bridge.

Maracic testified that he recalled the day the men went to the Union to complain; he stated that he wanted to fire all the employees who went to the Union on that occasion.

Chapple testified that before the group of employees went to the Union in March 1989, they had spoken to Stratis Cokinos, the union shop steward on the bridge, about Re-

¹Chapple first worked for Respondent from June through August 1987 painting the Jerome Avenue elevated in the Bronx.

²Painting on the Brooklyn Bridge is seasonal work. When the weather becomes severe in December or January, work is normally halted until March.

³The employees who went with Chapple were all journeymen. They included John Nascimento, "Duke," "Eddie," and "Ollie."

spondent's use of a spraying machine. Cokinos told them to do what they had to do. After Chapple returned from complaining to the Union, Cokinos called him a stool pigeon and told him he "had to pay for it."

Cokinos did not deny making this comment to Chapple.

On June 6, 1989, Chapple contacted the Union again and spoke to Nitis. He told the latter that ever since he had complained to the Union in March, Maracic had been abusing and harassing him. Chapple asked Nitis to speak to Maracic. Nitis responded that Chapple should be glad to have a job and that he could not help him.

On direct examination, Nitis testified that he recalled going to the bridge to correct a problem, but it did not involve a sprayer. On cross-examination, he recalled that a complaint was lodged with the Union concerning the use of a sprayer. Nitis did not seem able to recall much of anything to do with Chapple; however, he recalled that Chapple called and said he was being harassed on the job.

Chapple testified that Maracic harassed him by criticizing all of the work he performed. Maracic yelled at Chapple every day. Chapple described his work as an apprentice as "any general labor work." He did anything that was required to be done such as shoveling sand and cleaning up. According to Chapple, after March 1989, he was often asked to shovel sand alone instead of with other apprentices as had been the case before March 1989. Shoveling alone was more difficult. I note that the validity of Chapple's claims of harassment are not relevant to this case. General Counsel alleges that Chapple was discharged because he complained to the Union. Even if the complaints had no basis in fact, Respondent was not privileged to discharge Chapple for seeking redress from the Union.

On Wednesday, June 7, 1989, Chapple spoke to Cecil Bryant of the State Department of Transportation about his problems with Maracic. Bryant said he would come to the job the next day to speak to Maracic. The next day it rained and no work could be done. Chapple went to pick up his paycheck and then went home.

On Friday, June 9, 1989, Maracic fired Chapple. According to Chapple, Maracic said that he could not use him because he "stabbed him in the back twice. Once by calling the Union and second by calling the State." Maracic asked Chapple what he thought he could accomplish by going to the Union. Maracic "said that he had called Nitis the night before and said he don't care about any program he was going to fire [Chapple]."

Maracic testified that Chapple's duties were to help with any job assignment he was given.⁴ Maracic denied harassing Chapple. Maracic testified that he has known Chapple for several years and that Chapple used to do his job properly. Describing Chapple's work performance in 1989, Maracic testified, "since he went to the union after that he start not doing his job." According to Maracic, Chapple talked too much to the other people.

Cokinos testified that Chapple talked a lot on the job and kept other people from working. Cokinos testified that he has known Chapple for several years "and he was a good worker, and I don't know what happened to him." Cokinos ac-

knowledgeed that Chapple never refused the foreman's order to do some work, but he maintained that Chapple was not doing the job in 1989.

Maracic testified that he discharged Chapple on a rainy day. When Chapple came in, he told Chapple that he could not use him any more because he was not doing his job. According to Maracic he had warned Chapple before "a lot of times in the past two months" that if he did not do his work he would let him go. Maracic could not recall whether he discharged Chapple on the day he picked up his check or the next day. Maracic maintained that he had been warning Chapple daily for the last 2 months that one day he would get mad and fire him. Chapple denied that Maracic ever warned him that his job was in jeopardy. I credit Chapple's testimony and I do not credit Maracic.

Ralph Romano, vice president of field operations of Respondent, testified that Chapple had a bad record for absenteeism. Romano testified that about 1 week before the instant hearing, he checked the Company's books and found that Chapple worked only 48 of the 66 days that work was available in 1989. Romano claimed that before Chapple was fired he told Maracic that Chapple was absent too often. Romano claimed to have perused the timesheets every week to see what amounts the men were paid, but he admitted that he did not compare Chapple's attendance with that of the other apprentices. Maracic did not testify that he discharged Chapple for absenteeism. I find that Romano's testimony is incredible and I shall not rely on it.

B. Discussion and Conclusions

The uncontradicted testimony shows that Chapple and other employees complained to the Union that Foreman Maracic was running the job contrary to union rules. When Maracic heard of the employees' actions, he stated that he wanted to fire Chapple. Three months later, Chapple sought the Union's help because he felt harassed by Maracic. When the Union refused to do anything about this situation, Chapple complained to the State Department of Transportation. Chapple testified that Maracic discharged him, saying that Chapple had stabbed him in the back by, *inter alia*, going to the Union. Maracic did not specifically deny making this statement when he discharged Chapple. Maracic's purported reason for terminating Chapple, that he had become a poor worker, was expressed in terms that Chapple had not been doing his job since he went to the Union. Manifestly, Maracic connected Chapple's complaints to the Union with a sudden change in Chapple's previously good work habits. Finally, although Maracic stated that he discharged Chapple for failing to do his work, Romano testified that Chapple had a bad attendance record. This attempt to offer a different and shifting reason for the discharge leads me to conclude that Respondent is casting about to find a rationale to cover up an unlawfully motivated discharge. Thus, I do not credit Maracic's testimony that Chapple was discharged because his work had deteriorated.⁵

I find that Maracic discharged Chapple because Chapple complained to the Union that the job was not being run according to union rules and sought the assistance of the Union

⁴I note that Maracic testified in response to leading questions from counsel for Respondent. Where these go to the main issues in the case, Maracic's responses are not as reliable as would have been answers given to properly posed questions.

⁵I find that the reasons cited by Maracic and Romano are pretexts. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

with respect to working conditions. Respondent thus violated Section 8(a)(1) and (3) of the Act.

CONCLUSION OF LAW

By discharging Michael Chapple because he engaged in union activity, Respondent violated Section 8(a)(1) and (3) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged an employee, must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

The Respondent, Huber Painting Company, Inc./Dynamic Painting Corp., A Joint Venture, College Point, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging its employees because they engage in union activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Michael Chapple immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its jobsite at the Brooklyn Bridge and at its facility in College Point in New York copies of the attached

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in union activities on behalf of Structural Steel and Bridge Painters Union, Local 806, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Michael Chapple immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify him that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

HUBER PAINTING CO., INC./DYNAMIC PAINTING CORP., A JOINT VENTURE